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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 56

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Metropolitan Life Insurance Company, prays that a writ of certiorari issue to review the decree of the Court of Appeals for the Third Circuit entered March 10, 1964, which decree enforces an order of respondent National Labor Relations Board (the "Board") directing petitioner to bargain with the Insurance Workers International Union, AFL-CIO (the "Union").

Citations to Opinions Below

The opinion of the Court of Appeals (Appendix A, p. 15) is reported at —— F. 2d ——, 55 LRRM 2448. The Board's decision and order to bargain (Appendix A, p.

34) is reported at 141 NLRB No. 37. The Board's decision and direction of election (Appendix A, p. 45) is reported at 138 NLRB 565.

Metropolitan Life Insurance Company v. *National Labor Relations Board*, decided by the Court of Appeals for the First Circuit on February 17, 1964, is reported at —— F. 2d ——, 55 LRRM 2444. A copy of the opinion is appended to this petition (Appendix B, p. 52).

Jurisdiction

The decree of the Court of Appeals (Appendix A, p. 13) was entered on March 10, 1964. Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

In finding appropriate a collective bargaining unit consisting of only two of the three district offices maintained by the petitioner in the State of Delaware, did the Board treat as controlling the extent to which petitioner's employees had organized, and thereby violate Section 9(c)(5) of the National Labor Relations Act?

Statute Involved

The statutory provision involved is Section 9 of the National Labor Relations Act, as amended (the "Act"), 29 U. S. C. §159, which, so far as material, reads as follows:

> "REPRESENTATIVES AND ELECTIONS
>
> Sec. 9. (a) * * *
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest

freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: • • •

(c) (1) • • •

(2) • • •

(3) • • •

(4) • • •

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

Statement of the Case

The decision below is in direct conflict with a unanimous decision of the Court of Appeals for the First Circuit which preceded it by one day and which involved the same parties and the same issue.

In the case at bar, the Union on January 24, 1962 petitioned the Board for a representation election in a unit consisting of two of the three district offices operated by the petitioner in Delaware. Immediately before filing its petition, the Union had attempted to organize all three of petitioner's offices in Delaware. When that effort succeeded in only two of those offices, the Union limited its petition to the two district offices it had in fact organized. This action was in accordance with a stated policy of the Union that it would first seek to organize all the district offices in a particular locality and that it would then file a petition "on a district basis" limited to those offices in which its organizational efforts had succeeded.

The Board found appropriate the unit the Union requested, although it recognized that the Company's "business operations are highly centralized and policies and procedures are established at the home office which governs the management of the district office and the duties and functions of the agents * * * [; and that all] labor relations policies are established at the home office and all agents are subject to the same wage, policies, employee benefits, and working conditions." (Appendix A, pp. 47-48, 138 NLRB at 566-567). Although the Board said that the "individual district office * * * is inherently appropriate for purposes of collective bargaining", citing and relying on *Metropolitan Life Insurance Company,* 138 NLRB 512 (1962), it nevertheless held that that finding did not prohibit the grouping of such offices where such grouping is "justified by cogent geographic considerations". Therefore, the Board concluded that the two offices located in New Castle County, Delaware, constituted an appropriate unit for collective bargaining. Two members dissented, relying primarily on their dissent in *Metropolitan Life Insurance Company,* 138 NLRB 512, 516, in which they had said that "the unit which the majority finds appropriate appears to be based upon the Union's extent of organization."

On October 5, 1962, the Union won the Board-conducted election and on October 15, 1962, it was certified as collective bargaining representative for the employees in the unit. When petitioner refused to bargain with the Union on the ground that the unit certified by the Board was improper under Section 9 of the Act, it was charged with an unfair labor practice. On January 7, 1963, the trial examiner, after a hearing, issued his intermediate report (Appendix A, p. 36) recommending that petitioner be ordered to bargain with the Union. Exceptions were

duly filed and on March 11, 1963, the Board issued its decision and order, ordering petitioner to bargain with the Union in the questioned unit (Appendix A, p. 34).

Pursuant to Section 10(e) of the Act (29 U. S. C. §160(e)) and 28 U. S. C. §1212, petitioner sought review of the order of the Board, raising only the question of the legality of the bargaining unit. The Board cross-petitioned for enforcement. In its decision dated February 18, 1964, the Third Circuit unanimously held that the Board's order should be enforced (Appendix A, p. 15). Thereafter, on March 10, 1964, the decree (Appendix A, p. 13) was entered.

In the First Circuit case, after the Union had failed in its efforts to organize a state-wide unit, the Board granted the Union's petition for "an employee unit consisting of the debit insurance agents working out of only its one Woonsocket [Rhode Island] district office" (Appendix B, p. 53). "[T]he Board majority relying on prior decisions determined that one district office out of eight in a small densely populated state constituted an appropriate bargaining unit." (*Id.*, pp. 57-58.)

The Board's order directing petitioner to bargain with the Union in such a unit was unanimously set aside by the First Circuit and the Board's cross-petition for enforcement was denied. The court concluded that, in finding the one-office unit appropriate, the Board had regarded "the extent of union organization as controlling in violation of §9(c)(5) of the Act." (*Id.*, p. 62.)

Reasons for Granting the Writ

1. The decision below is in direct conflict with the decision of the First Circuit in *Metropolitan Life Insurance Company* v. *National Labor Relations Board*, —— F. 2d

——, 55 LRRM 2444 (Appendix B, p. 52), rendered one day earlier and involving virtually identical facts.*

Both the Third and First Circuits were presented with the same issue, an issue that had arisen from a change in long-established Board policy. As the court below pointed out, prior to 1947 the Board had freely and properly placed "strong, if not overwhelming reliance * * * on the factor of the union's extent of organization." (Appendix A, p. 19.) In that year, Congress severely limited this practice by expressly prohibiting the Board from making "the extent to which the employees have organized * * * controlling" in determining appropriate units (Section 9(c)(5)).

Even before the enactment of §9(c)(5), the Board itself had discarded "extent of organization" as a principle applicable to the insurance industry. In *Metropolitan Life Insurance Company*, 56 NLRB 1635 (1944), it reviewed its policy and decided that, regardless of extent of organization, it would no longer approve any units in the insurance industry smaller than state-wide.

The state-wide rule was consistently adhered to in scores of cases until *Quaker City Life Insurance Company*, 134 NLRB 960 (December 1961). There, with two members dissenting, the Board changed its 1944 state-wide rule and granted a petition for a unit consisting of a single office. The majority explained that the 1944 rule had been "adopted for the purpose of permitting organization on a statewide or employerwide basis, which did not develop as antici-

* The decision below was later held by the same court to be dispositive of the issues presented in *National Labor Relations Board* v. *Western and Southern Life Insurance Company*, —— F. 2d ——, 55 LRRM 2623 (March 4, 1964). It should be noted also that, in its opinion in the case at bar (Appendix A, p. 24, footnote 15), the Third Circuit expressed its difference with the interpretation of §9(c)(5) applied by the Fourth Circuit in *National Labor Relations Board* v. *Glen Raven Knitting Mills*, 235 F. 2d 413 (1956) and *National Labor Relations Board* v. *Morganton Full Fashioned Hosiery Co.*, 241 F. 2d 913 (1957).

pated. Contrary to our dissenting colleagues, we regard this as a valid reason for changing the rule."*

Quaker City was followed by a series of cases (collected in the opinion of the First Circuit, Appendix B, p. 57), many involving petitioner, in which the Board has always found appropriate whatever unit the Union has requested, including a single district office, a state-wide unit, a metropolitan area unit, a unit bounded by city limits, or single district offices within a city.

Neither in the *Quaker City* case nor in any of the cases that followed it did the Board majority acknowledge that "extent of organization" played any part at all in its decisions, although the two dissenting Board members in each case in which they participated asserted their view that the majority's determination had been based upon that consideration.

In the case at bar, the court rejected petitioner's argument that, regardless of the reasons advanced by the Board, the true basis for its decision was extent of organization. It accepted the Board's finding that the grouping of two district offices "is justified by cogent geographic considerations", holding that such a determination was "consonant with Section 9(b) and not in violation of 9(c)(5) of the Act" (Appendix A, p. 31). The court's examination of the record satisfied it "that the grounds

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* The unit found appropriate in *Quaker City* was left undisturbed by the two-to-one decision of the Fourth Circuit in *National Labor Relations Board* v. *Quaker City Life Insurance Company*, 319 F. 2d 690 (1963). There, the majority found that "The only effect given to the extent of organization was in the policy decision to overrule the Metropolitan case and permit appropriate smaller than state-wide units." (At p. 693.) Judge Boreman dissented, concluding that the Board's decision "reeks with consideration of extent of organization." (At p. 696.)

upon which the Board rendered its determination are not unreasonable and are supported by substantial evidence on the whole case." (*Id.*, p. 33.)

On a record indistinguishable in any material particular from the record in the case at bar, the First Circuit unanimously held that the Board's unit determination violated Section 9(c)(5). *Metropolitan Life Insurance Company* v. *National Labor Relations Board*, —— F. 2d ——, 55 LRRM 2444 (Appendix B, p. 52). That court set forth its own review of the history of Board decisions in the insurance industry, with particular attention to the decisions subsequent to *Quaker City*. It noted that the Board had not consistently followed its own stated criteria. By way of illustration, the court compared the Board's decision in Cleveland in which it had held appropriate a unit comprising the entire Cleveland metropolitan area, including urban and suburban offices (138 NLRB 512), with the Board's decision in Chicago in which it had held that the unit requested by the Union, which excluded suburban offices, was appropriate (144 NLRB No. 15). The court could find no valid explanation "[w]hy there should be a community of interest among Metropolitan's agents working from both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago".

Considering the recent decisions of the Board and the facts of the case, the court reasoned (Appendix B, pp. 61-62):

> "Looking at its [the Board's] actions, however, we have not found a single instance since Quaker City wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union. We

would not consider this fact alone decisive for we would hesitate to assume that the Board was subservient to the Union. Yet we believe this fact is entitled to considerable weight in the light of the testimony of the Union's vice-president in Metropolitan's Cleveland case, supra, which was incorporated by stipulation in the record in the instant case, that if the Union did not succeed in organizing on a broader basis it would as a matter of policy petition for a unit 'on a district basis.' Indeed it is apparent that the Union followed this policy in the present case for in May and June 1962 it had engaged in organizational activities among agents attached to all of the Company's 8 district offices and 2 detached offices in Rhode Island, and it was only after lack of success in its state-wide attempt that it sought and received the Board's acceptance of the single district office in Woonsocket.

"In short, the Union naturally wants units in which it can win elections and on the basis of the Board majority's actions, which speak more clearly than its words, it seems to us evident that in this case the Board majority in keeping with its apparent practice in recent years has given the Union the unit it wants. In the absence of any statement by the Board majority of any other rational basis for its varying unit determinations, we can only conclude that the two member Board minority is correct in its charge that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of §9(c)(5) of the Act."

There is no basis on which the First and Third Circuit decisions can be reconciled. Review by this Court is the only means by which this important question can be settled.

2. The question is one of federal law which has not been, but should be, settled by this Court because of its great significance in the administration of the Act. The Board has recently decided a great number of unit cases involving insurance and other companies in which, as in this case, it has ignored the prohibition of Section 9(c)(5) and "held that arbitrary groupings of employees, obviously based solely on the Union's extent of organization, constitute appropriate units for the purposes of collective bargaining." (Dissenting opinion in *F. W. Woolworth Company*, 144 NLRB No. 35, 54 LRRM 1043, 1044 (1963).)

The *Woolworth* case is the latest in a series of cases in which the Board, relying in part on the policy first enunciated in *Quaker City*, has overturned long-standing rules governing unit determination. *Metropolitan Life Insurance Company*, 144 NLRB No. 15, 54 LRRM 1005 (1963); *Life Insurance Company of Virginia*, 143 NLRB No. 128, 53 LRRM 1515 (1963); *Liebmann Breweries, Inc.*, 142 NLRB No. 9, 52 LRRM 1527 (1963); *P. Ballantine & Sons*, 141 NLRB No. 98, 52 LRRM 1453 (1963); *Dixie Belle Mills, Inc.*, 139 NLRB 629 (1962); *Sav-On Drugs, Inc.*, 138 NLRB 1032 (1962); *The Western and Southern Life Insurance Company*, 138 NLRB 538 (1962); *Equitable Life Insurance Company*, 138 NLRB 529 (1962); *Quaker City Life Insurance Company*, 134 NLRB 960 (1961).

The issue whether the Board is making extent of organization controlling in its unit determinations has also been raised in two Sixth Circuit cases, now awaiting decision, *Metropolitan Life Insurance Company* v. *National Labor Relations Board*, Case No. 15,366; *National Labor Relations Board* v. *Equitable Life Insurance Company*, Case No. 15,628, and an authoritative decision by this Court is needed to settle the meaning and scope of Section 9(c)(5).

3. Certiorari should be granted to correct the erroneous decision below and to confirm the correctness of the First Circuit decision. The court below erred in relying solely on the ostensible reasons given by the Board for its conclusion. In this connection, it is to be noted that, in enacting Section 9(c)(5), Congress found that the Board often "pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate * * *" (House Majority Report No. 245 on H. R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. 328). The Board itself has admitted that it does not always state the real reasons for its conclusions. See, e.g., *Livingston Shirt Corporation*, 107 NLRB 400, 407 (1953).

The First Circuit decision, on the other hand, carefully considered the Board's actions "which speak more clearly than its words" and reached the unavoidable conclusion that extent of organization had been treated as controlling. Unlike the court below which chose to ignore the pattern of Board decisions following the enunciation of its new policy in *Quaker City*, the First Circuit found not "a single instance since Quaker City wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union." This revealing light on the true reasons for the Board's conclusion should have led the court below to set aside the Board's order, just as it led the First Circuit to do so in the Rhode Island case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 7, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,390

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Decree

Before:

McLAUGHLIN, HASTIE and FORMAN,

Circuit Judges.

This cause came on to be heard upon the petition of Metropolitan Life Insurance Company, to review and set aside a certain order of the National Labor Relations Board issued against petitioner on March 11, 1963, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on October 15, 1963, and has considered the briefs and the transcript of record filed in this cause. On February 18, 1964, the Court, being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

Decree

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the petition of the Metropolitan Life Insurance Company be denied and that the said order of the National Labor Relations Board in said proceeding be enforced and that Metropolitan Life Insurance Company, its agents, officers, successors, and assigns abide by and perform the directions of the Board in said order contained.

BY THE COURT

McLAUGHLIN
Circuit Judge

Dated: March 10, 1964

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,390

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued October 15, 1963

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

Opinion of the Court

(Filed February 18, 1964)

By McLAUGHLIN, *Circuit Judge.*

This case is before the court upon the petition of the Metropolitan Life Insurance Company (Metropolitan) to review and set aside an order of the National Labor Relations Board (Board) issued against Metropolitan on March 11, 1963, pursuant to Section 10(e) of the National Labor Relations Act, as amended. 29 U.S.C. § 151 et seq.

(1958). In its answer the Board has requested that its order be enforced in full.

Metropolitan is a New York corporation, engaged in the sale and issuance of insurance policies throughout the United States and Canada. Its operations are highly centralized and the practices and procedures established at the New York home office govern the district offices, which are the basic operating units of the company. A superintendent of agencies oversees the district offices in his territory, while each district office is under the supervision of a manager. The district offices themselves are relatively independent of each other, except in so far as they are joined by the company into a territory. There is virtually no interchange of agents among the various district offices, and there is no business or social contact among agents except on the individual district office level.

Delaware is part of Metropolitan's Atlantic Coast Territory with three district offices. Two are in the Wilmington area, called Brandywine and Kirkwood, and the third is forty-six miles from Wilmington in Dover. These offices account for fifty-four regular (in the field) agents and four office account agents. Brandywine has eighteen, Kirkwood nineteen, and Dover seventeen.

It was within this organizational structure, the Insurance Workers' International Union, AFL-CIO (Union) sought to organize Metropolitan's insurance agents in Delaware. Apparently failing in its attempt to organize the agents of the three district offices, the Union petitioned the Board, pursuant to § 9(c) of the Act, requesting certification as bargaining representative of the agents at the two Wilmington district offices. The Board decided that the grouping of these two offices was an appropriate unit for collective bargaining and directed an election to be

held. The Metropolitan Life Insurance Company, 138 N.L.R.B. 565 (1962). The Union won and on October 15, 1962 the Board certified the Union as the representative.

Upon Metropolitan's refusal to bargain, the Board found that Metropolitan was guilty of an unfair labor practice within the meaning of Section 8(a)(5) and Section 8(a)(1) of the Act. Metropolitan Life Insurance Company, 141 N.L.R.B. No. 37 (1963). Metropolitan has admitted that it refused to bargain but has argued consistently below and here, that the grouping of the Brandywine and Kirkwood district offices, is not an appropriate unit, that the Board's unit determination is based on the Union's extent of organization contrary to § 9(c)(5) of the Act.

By virtue of Section 9(b) of the National Labor Relations Act (Wagner Act), Congress has given the Board the authority to determine units appropriate for purposes of collective bargaining. 29 U.S.C. 159(b) (1958), as amended. The Taft-Hartley Amendments have not altered this and the determination of an appropriate unit remains one left to the wide and informed discretion of the Board. Its decision, if not final, is rarely to be disturbed. Packard Motor Car Company v. N.L.R.B., 330 U.S. 485, 491 (1947); Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208, 210 (5 Cir. 1961); Foreman & Clark, Inc. v. N.L.R.B., 215 F.2d 396, 405 (9 Cir. 1954). See N.L.R.B. v. Pittsburgh Plate Glass Co., 270 F.2d 167, 173 (4 Cir. 1959); N.L.R.B. v. J. W. Rex Co., 243 F.2d 356, 359 (3 Cir. 1957); Westinghouse Electric Corp. v. N.L.R.B., 236 F.2d 939, 942 (3 Cir. 1956); N.L.R.B. v. Botany Worsted Mills, 133 F.2d 876, 880 (3 Cir. 1943). However, the 1947 amendments, by the addition of certain sections and provisos to the Act, limited the discretion of the Board in determining appropriate

units. This appeal is focused on Section 9(c)(5),[1] one such limiting section and the issue to be determined here is whether in the exercise of its said discretion, the Board went afoul of the Congressional mandate that in determining appropriate units, the extent to which the employees have organized shall not be controlling.

Early in its life, the Board had developed the so-called "Extent of organization" theory. This theory, quickly endorsed by the courts,[2] gave expression to the view that it was desirable in the determination of an appropriate unit to render collective bargaining of employees an immediate or reasonably early possibility. The Board regarded this

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[1] Section 9 "(a) • • •

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this sub-chapter, the unit appropriate for the purposes of collective bargaining, shall be the employer unit, craft unit, plant unit, or subdivision thereof: • • •

(c) (1) • • •

(2) • • •

(3) • • •

(4) • • •

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

[2] N.L.R.B. v. Hearst Publications, 322 U.S. 111, 134 (1944), citing Matter of Gulf Oil Co., 4 N.L.R.B. 133, 137 (1937); May Department Stores Co. v. N.L.R.B., 326 U.S. 376, 380 (1945) endorsing the view of the Board in 50 N.L.R.B. 669, 672 (1943); N.L.R.B. v. Norfolk Southern Bus Corp., 159 F.2d 516, 520 (4 Cir. 1947); N.L.R.B. v. Botany Worsted Mills, 133 F.2d 876 (3 Cir. 1943), endorsing the appropriate unit in 27 N.L.R.B. 687, 690 (1940); See also Matter of R.C.A. Communications, Inc., 2 N.L.R.B. 1109, 1115 (1937); Gulf Oil Co., 4 N.L.R.B. 133 (1937); New England Spun Silk Corporation, et al., 11 N.L.R.B. 852, 855 (1939); Gastonia Weaving Co., Inc., 49 N.L.R.B. 342, 344 (1943); J. L. Hudson Co., 56 N.L.R.B. 406, 408 (1944); Armour and Co., 63 N.L.R.B. 1214, 1216-1217 (1945); Wells-Gardner & Co., 71 N.L.R.B. 176, 178 (1946).

view as an obedient implementation of the command of the National Labor Relations Act that it seek to "insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act." [3] However, as the theory was brought to bear on Board determinations of appropriate units, it became clear that in certain instances, the extent of employee organization was given controlling weight. See Matter of Chase Brass & Copper Co., Inc., 4 N.L.R.B. 47, 51 (1937); New England Spun Silk Corp., 11 N.R.L.B. 852 (1939); Matter of Botany Worsted Mills, 27 N.L.R.B. 687 (1940), with which Board determination we did not interfere. N.L.R.B. v. Botany Worsted Mills, 133 F.2d 876 (3 Cir. 1943); J. L. Hudson Co., 56 N.L.R.B. 406 (1944).

These decisions and others[4] attest to the strong, if not overwhelming reliance the Board, from time to time, placed on the factor of the union's extent of organization. It was this approach Congress sought to block.

Representative Fred A. Hartley, presenting the House Report on its bill to amend the National Labor Relations Act said in regard to what was to become 9(c)(5):

---

[3] Under the National Labor Relations Act before the 1947 amendments, 9(b) provided:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof."

The changed phraseology in Section 9(b) (see footnote 1) did not change its substance and the pre-1947 considerations are written into the Taft-Hartley version of the section. See 13 N.L.R.B. Ann. Rep. 36 (1948); National Tube Company, 76 N.L.R.B. 1199, 1203 (1948).

[4] See footnote 2.

"Section 9(e)(3) strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate. [Matter of New England Spun Silk Co., 11 N.L.R.B. 852 (1939); Matter of Botany Worsted Mills, 27 N.L.R.B. 687 (1940).] While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and as section 9(e)(3) provides, is not to be controlling." 1 Leg. Hist. 328.[5]

Senator Robert Taft, after the bill had passed the first time (the Senate and House later had to vote to override President Truman's veto), submitted a supplementary analysis of the Labor Bill as passed "in order to make clear the legislative intent." As to § 9(c)(5), Senator Taft said:

"It overrules the 'extent of organization' theory sometimes used by the Board in determining appropriate units. Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities, insurance companies and other business whose operations are widespread. It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical considerations, etc., any one of which may justify the finding of a

[5] Leg. Hist. denotes the two volume work Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948).

small unit. The extent of organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units. Its use has been particularly bad where another union comes in and organizes the remainder of the unit which results in the establishment of two inappropriate units." 2 Leg. Hist. 1625.

Simultaneous with the hearings and debates in Congress regarding the proposed amendments to the National Labor Relations Act, the Board was confronted with a series of representation petitions[6] of which Garden State Hosiery Co., 74 N.L.R.B. 318 (1947) is most informative. For the first time the Board entered upon an extended discussion of the significance of the extent of organization theory in its consideration of an appropriate unit.

In Garden State Hosiery Co., 74 N.L.R.B. 318, 322-323 (1947), the Board said:

"Extent of existing organization can never be the sole criterion, nor is it often the controlling one. The Board has always insisted on the coexistence of certain other facts that establish the feasibility of bargaining on the basis of the smaller unit. Additional objective factors must be present in order to rule out the possibility that the petitioning union might un-

[6] Chadbourne Hosiery Mills, Inc., 74 N.L.R.B. 333 (1947); Jacoby-Bender, Inc., 74 N.L.R.B. 337 (1947); Asheboro Hosiery Mills, Inc., 74 N.L.R.B. 341 (1947); Waldensian Hosiery Mills, Inc., 74 N.L.R.B. 315 (1947); Hudson Hosiery Company, 74 N.L.R.B. 250 (1947). All of these cases were decided on the same day, June 20, 1947, after the labor bill had passed the Senate and the House for the first time. On June 20, 1947, President Truman sent his message to Congress vetoing the Taft-Hartley Amendments.

restrictedly manipulate the boundaries of the appropriate unit. Thus, not only must bargaining on a more comprehensive basis be improbable in the near future but, as a wholly separate matter, the unit sought must itself be homogeneous, identifiable and distinct. Indeed the Board has consistently refused to set apart as an appropriate unit any subdivision or group of employees the nature or situs of whose work is indistinguishable from that of other employees, or whose work is not functionally coherent and differentiated, despite the contention of a petitioning union to the contrary. Petitions which lack objective support are regularly dismissed, despite union's attempts to invoke the extent of organization theory."

See also Hudson Hosiery Company, 74 N.L.R.B. 250, 252 (1947). One such objective factor of which the Board speaks springs from the statute itself. The unit proposed must be an "employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. 159(b) (1958); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941); N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944). Other factors born of the expertise of the Board and used to determine appropriate units have been: whether the proposed unit is homogeneous, identifiable, and distinct;[7] its previous history of bargaining;[8] whether there is a community of in-

[7] See Garden State Hosiery, 74 N.L.R.B. 318 (1947); Rothschild-Kaufman Co., Inc., 98 N.L.R.B. 353 (1952); N.L.R.B. v. Convair Pomona, 286 F.2d 691, 696 (9 Cir. 1961); Glen Raven Knitting Mills v. N.L.R.B., 235 F.2d 413 (4 Cir. 1956); N.L.R.B. v. Moss Amber Mfg. Co., 264 F.2d 107 (9 Cir. 1959); David Max & Co., 109 N.L.R.B. 1308 (1954). In determining "identity" or "distinct" character, whether there was an interchange of employees would be important.

[8] See International Association of Tool Craftsmen v. Leedom, 276 F.2d 514 (D.C. Cir. 1960) where the Court at p. 516 referred to this factor considered by the Board, because it is some evidence of a natural grouping.

terest among the employees;[9] geographical proximity;[10] the relationship between the proposed unit and the organization of the employer's business;[11] and the similarity of jobs and functions.[12]

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[9] Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208 (5 Cir. 1961); N.L.R.B. v. Armour & Co., 154 F.2d 570 (10 Cir. 1946); Foreman & Clark, Inc. v. N.L.R.B., 215 F.2d 396 (9 Cir. 1954): There, at p. 406, the court spoke of "a cohesive group, allied as to their bargaining interests by the similarity of their functions and working conditions"; 13 N.L.R.B. Ann. Rep. 35 (1948); said the Board in Montgomery Ward & Co., 114 N.L.R.B. 1155 (1955): In establishing and describing appropriate units, the Board "strives to give meaning and practical effect to the actual day-to-day relationships among employees. The Board's aim is best served by giving controlling effect to the community of interest existing among employees • • • ."

[10] Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208 (5 Cir. 1961); N.L.R.B. v. Kentucky Coal Co., 152 F.2d 198, 202 (6 Cir. 1945); N.L.R.B. v. Smythe, 212 F.2d 664 (5 Cir. 1954); N.L.R.B. v. Smith, 209 F.2d 905, 907 (9 Cir. 1954); N.L.R.B. v. Moss Amber Mfg. Co., 264 F.2d 107 (9 Cir. 1959); Great A. & P. Tea Company, 128 N.L.R.B. 342, 343-344 (1960); Jackson Jitney Jungle Stores, Inc., 115 N.L.R.B. 374, 375 (1956); B. G. Wholesale, Inc., 114 N.L.R.B. 1429, 1430-31 (1955); Buitoni Foods, Inc., 111 N.L.R.B. 638, 639 (1955).

[11] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941).

[12] Texas Pipe Line Company v. N.L.R.B., 296 F.2d 208 (5 Cir. 1961); N.L.R.B. v. Smythe, 212 F.2d 664 (5 Cir. 1954). See generally: Mountain States Telephone & Telegraph Co. v. N.L.R.B., 310 F.2d 478 (10 Cir. 1962); 1 N.L.R.B. Ann. Rep. 112-20 (1936); Magruder, A Half-Century of Legal Influence Upon the Development of Collective Bargaining, 50 Harv. L. Rev. 1071, 1106 (1937); 12 N.L.R.B. Ann. Rep. 20-21 (1947); 11 N.L.R.B. Ann. Rep. 24 (1946); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 153 (1941). See 27 Fordham L. Rev. 218, 220 (1958). Note also the test devised for determination of an appropriate employer unit; resolving the issue of whether two closely related businesses constitute an appropriate single bargaining unit: present unity of interest, common control, dependent operation, sameness of character of work and unity of labor relations between the separate entities involved. N.L.R.B. v. Gibraltar Industries, Inc., 307 F.2d 428 (4 Cir. 1962); N.L.R.B. v. Jones Sausage Co., 257 F.2d 878 (4 Cir. 1958); N.L.R.B. v. Williams, 195 F.2d 669 (4 Cir. 1952).

Applying these factors, the Board could determine any number of appropriate units, comprising a given set of employees.[13] However, the question before the Board will of necessity be whether the proposed unit is appropriate, and in making that decision, Congress has now said, "the extent to which the employees have organized shall not be controlling." With all this in mind, we believe the effect of 9(c)(5) is to require the Board to determine whether a unit is in and of itself appropriate, apart from the extent to which the employees are organized.[14] Whether the employees were controlled by the extent of their organization when they petitioned the Board is not the issue. Rather, it is whether the Board in determining a unit's appropriateness was so controlled.[15]

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[13] The Board has said "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate'. It *must* be appropriate to ensure to employees, *in each case*, 'the fullest freedom in exercising the rights guaranteed by this Act.'" Morand Brothers Beverage Co., 91 N.L.R.B. 409, 418 (1950); see also Garden State Hosiery, 74 N.L.R.B. 318, 324 (1947); Mueller Brass Co. v. N.L.R.B., 180 F.2d 402 (D.C. Cir. 1950); N.L.R.B. v. Smith, 209 F.2d 905, 907 (9 Cir. 1954).

[14] The extent of organization is not excluded as a factor. Section 9(c)(5) permits it to be a contributing, but not a controlling factor. However, while this is what the section says, what it effects is to require the Board to discover a unit's appropriateness, apart from the extent of employee organization. The Board may regard the extent to which the employees are organized as having inherent evidentiary value, in the same way as prior history of bargaining (see footnote 8), but this should not control its determination.

[15] In this we differ with the interpretation of 9(c)(5) in N.L.R.B. v. Glen Raven Knitting Mills, 235 F.2d 413 (4 Cir. 1956) and N.L.R.B. v. Morganton Full Fashioned Hosiery Co., 241 F.2d 913 (4 Cir. 1957). In Glen Raven there was evidence that the Union

The extent to which the Union failed to organize should not determine the appropriateness of the group it did organize. To hold, that because the Union failed to organize on a broader basis, the smaller unit petitioned for is inappropriate, would be to penalize the Union for failing in an attempt to organize, which right is fundamental to the Act. We are therefore, of the same mind as Member Fanning, who in his special concurrence in Life Insurance Company of Virginia, 123 N.L.R.B. 610, 614 (1959), said:

> "Labor organizations are in the business of organizing employees, and it is not fanciful to assume that they desire to organize all the employees they can, or at least, all employees in certain job classifications.
>
> "That the Board has heretofore given a reasonable interpretation to the extent of organization provision 9(c)(5) is evident in prior decisions where, for example, the Board has held that the fact that a labor organization may have unsuccessfully attempted to organize on a broader basis does not render the smaller unit sought inappropriate when the smaller unit is otherwise appropriate. (See Whittaker Controls Division of Telecomputing Corporation (Lynwood Plant), 122 N.L.R.B. 624 (1958); Berger Brothers Company, 116 N.L.R.B. 439 (1956))."

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failed to organize on a broader basis and sought a smaller unit which it had successfully organized and which the Board approved as appropriate. The court overturned the Board. Its rationale as described in Morganton at p. 915 was: "Clearly the union was controlled by the extent of its organization, and when the Board, with full knowledge of the facts, gave its approval, it failed to observe the provisions of the statute, * * *." However, Judge Boreman in his dissent in N.L.R.B. v. Quaker City Life Insurance Co., 319 F.2d 690 (4 Cir. 1963) hinted that the majority approach in the Quaker City case was in effect overruling Glen Raven and Morganton.

Our interpretation of 9(c)(5) is not in conflict with our decision in Westinghouse Electric Corp., 236 F.2d 939 (3 Cir. 1956) or the view of other circuits in Quaker City Life Insurance Company v. N.L.R.B., 319 F.2d 690 (4 Cir. 1963); Foreman & Clark, Inc. v. N. L.R.B., 215 F.2d 396 (9 Cir. 1954); N.L.R.B. v. Moss Amber Manufacturing Co., 264 F.2d 107 (9 Cir. 1959); Harris Langenberg Hat Co. v. N.L.R.B., 216 F.2d 146 (8 Cir. 1954); N.L.R.B. v. Smythe, 212 F.2d 664 (5 Cir. 1954), which proposes that the extent of organization may be a factor although not the controlling one, as long as other valid tests indicate the unit is appropriate. This view is also sensitive to the legislative purpose of 9(c)(5). Of the many factors employed by the Board in determining appropriate units, Congress limited only the extent of union organization. On the other hand, Senator Taft specifically referred to the others, some of which we enumerated above, which could be properly employed by the Board. See statement of Senator Taft, supra. Further, consistent with our holding here, is the Board's interpretation of 9(c)(5) which, while not binding on this court, is entitled to weight. Since the amendment, the Board has looked to factors other than extent of organization in determining appropriate units.[16] See particularly Waldensian Hosiery Mills, Inc., 83 N.L.R.B. 742, 744 (1949). Of course, the various factors and policies the Board will follow in determining appropriate units will depend in great part on the type of unit proposed, whether

[16] Life Insurance Co. of Virginia, 143 N.L.R.B. No. 128 (1963); Singer Sewing Machine Co., 140 N.L.R.B. 1061, 1064 (1963); Sav-on Drugs, Inc., 138 N.L.R.B. 1032, 1035 (1962); Transcontinental Bus System, Inc., 119 N.L.R.B. 1840, 1844 (1958); see also Berger Brothers Co., 116 N.L.R.B. 439, 441 (1956); J. I. Case Company, 87 N.L.R.B. 692 (1949).

it be residual, departmental, single plant, multi-plant or multi-employer, and on the type of industry involved. But whatever the kind of unit, the extent to which the employees are organized cannot be controlling.

This review is also focused on the insurance industry and the organization of insurance agents regarding which, for many years, a special rule was promulgated by the Board. In 1944, the Board adopted the policy that it would avoid certifying bargaining units of insurance agents less than state or company-wide in scope. Metropolitan Life Insurance Co., 56 N.L.R.B. 1635 (1944). This policy had not apparently been tested by the courts since the Taft-Hartley Amendments. But see Prudential Life Insurance Co., 56 N.L.R.B. 1859 (1944) affirmed 154 F.2d 385 (6 Cir. 1946). In Metropolitan (1944), the Board said at p. 1639:

> "Organization among insurance agents is comparatively recent, but is steadily growing. The tendency of such organization is toward statewide units • • •. Thus, the rapid growth of union organization among insurance agents makes it clearly appear that provisional units less than state-wide in scope are, under ordinary circumstances, unnecessary to make collective bargaining reasonably possible for them, if they desire it. Accordingly, we are of the opinion that, in the absences of unusual circumstances, the practice of setting up units for insurance agents smaller than state-wide in scope should be avoided."

This thinking guided the Board's determinations for seventeen years until Quaker City Life Insurance Company, 134

N.L.R.B. 960 (1961).[17] In Quaker City, the Board, with two members dissenting, found appropriate a unit consisting of employees of a single district office. The Fourth Circuit upheld the decision of the Board. N.L.R.B. v. Quaker City Life Insurance Co., 319 F.2d 690 (4 Cir. 1963). The Board held, at page 962, that the Metropolitan rule was:

> "* * * adopted *solely* in anticipation of broader organization on a company-wide or state-wide basis, which at that time appeared imminent. As a practical matter, however, such state-wide or company-wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter, by the Board, that decided the Metropolitan Life case. There is no longer any rational basis for applying different rules of organization to the insurance industry, than are applied to other industries. The rule was adopted for the purpose of permitting organization on a state-wide or employer-wide basis, which did not develop as anticipated. Contrary to our dissenting colleagues, we regard this as a valid reason for changing the rule. Obviously, when the purpose for which a rule has been established fails, the rule should also fail. This

[17] See inter alia: John Hancock Mutual Life Insurance Company, 57 N.L.R.B. 700 (1944); Prudential Insurance Company of America, 61 N.L.R.B. 1289 (1945); Quaker City Life Insurance Company, 73 N.L.R.B. 177 (1947); Monumental Life Insurance Company, 75 N.L.R.B 776 (1948); Home Beneficial Life Insurance Company, 89 N.L.R.B. 392 (1950); United Insurance Company, 108 N.L.R.B. 843 (1954); The Life Insurance Company of Virginia, 123 N.L.R.B. 610 (1959); but see Prudential Life Insurance Company, 56 N.L.R.B. 1859 (1944) affirmed 154 F.2d 385 (6 Cir. 1946).

> is especially so with respect to a rule which unfairly prejudices the collective bargaining rights of employees. Accordingly, in the future, the Board's policy will be not to preclude the organization of insurance agents into units of less than employer-wide or statewide scope, and we shall apply our normal unit principles to the cases as they arise."

Since Quaker City, pursuant to its new policy, the Board has found as appropriate: a unit composed of district offices in the Cleveland area: Metropolitan Life Insurance Company, 138 N.L.R.B. 512 (1962), Equitable Life Insurance Company, 138 N.L.R.B. 529 (1962); two individual units, one at the McKeesport, Pennsylvania, District office and another at the Wilkinsburg, Pennsylvania, District office: Western and Southern Life Insurance Company, 138 N.L.R.B. 538 (1962); a unit composed of employees at the Sioux City, Iowa, Sioux Falls, South Dakota, and Fargo, North Dakota, district offices because the offices were administratively controlled by the Sioux City district office: Metropolitan Life Insurance Company, 138 N.L.R.B., 734 (1962); a unit comprising the employees of the Chicago district offices: Metropolitan Life Insurance Co., 144 N.L.R.B. No. 15 (1963); a unit composed of the employees in a single district office: Life Insurance Company of Virginia, 53 L.R.R.M., 1515 (1963): and it was pursuant to its new policy that, the Board in this case found that the employees of the two district offices in the Wilmington area constituted appropriate unit. Metropolitan Life Insurance Company, 138 N.L.R.B. 565 (1962).

First of all, there can be no question that it was within the authority of the Board to change its rule, if in so doing, it did not act arbitrarily and unreasonable or in

violation of the Act. SEC v. Chenery Corp., 332 U.S. 194 (1946); N.L.R.B. v. National Container Corp., 211 F.2d 525 (2 Cir. 1954); Optical Workers' Union v. N.L.R.B., 227 F.2d 687 (5 Cir. 1955); N.L.R.B. v. Pittsburgh Plate Glass Co., 270 F.2d 167, 174 (4 Cir. 1959). Metropolitan, however, argues that the change in policy represented a return to the extent of organization theory of choosing appropriate units, in violation of 9(c)(5). Metropolitan misreads the Board's reasons in Quaker City for the change in policy. It was the Board's informed view that the 1944 Metropolitan rule "unfairly prejudiced the collective bargaining rights of employees." There is a vast difference between taking away an obstacle to wider union organization and collective bargaining which is the explicit legislative purpose and mandate of the Act, and determining appropriate units on the basis of employee organization. Conversely, however, [though the point is now moot and we do not decide it] the Metropolitan state-wide rule seemed itself born of the extent of organization theory. Metropolitan Life Insurance Company, 56 N.L.R.B. 1635 (1944); Quaker City Life Insurance Company, 73 N.L.R.B. 177 (1947); Prudential Life Insurance Company, 61 N.L.R.B. 1289, 1292 (1945); Life Insurance Company of Virginia, 123 N.L.R.B. 610 (1959), see special concurring opinion of Member Fanning at p. 614.

The Board here decided on the entire record before it that "* * * all agents are subject to the same wage policies, employee benefits and working conditions. * * * There is virtually no interchange or transfer of agents among the various district offices and there is no business or social contact among the agents except on the individual district office level. There is no history of collective bargaining affecting the employees involved in the instant

proceedings. * * * [T]he individual district office is in effect a separate administrative entity through which the Employer conducts its business operation, and therefore, is inherently appropriate for purposes of collective bargaining. * * * [T]his finding does not preclude the grouping of such offices where such grouping is justified by cogent geographic considerations." Metropolitan Life Insurance Company, 138 N.L.R.B. 565, 567 (1962). For these reasons, the Board concluded that the agents of Metropolitan in the two Wilmington districts were an appropriate unit for collective bargaining. We believe the Board's determination was within its informed discretion consonant with Section 9(b) and not in violation of 9(c)(5) of the Act. As we noted above, the Union may be controlled by the extent of its organization so long as the Board is not so controlled, i.e., the certified appropriate unit must be in and of itself appropriate apart from the extent of employee organization. Metropolitan has contended that a state-wide territorial or company-wide unit is the appropriate unit. The Board might so declare such a unit appropriate, for, as the Board has said, there may be several kinds of appropriate units involving a given group of employees. The question should be and is in this instance whether the proposed unit is appropriate, in deciding which the Board has applied, it appears, the same criteria as it has to other industries and retail establishments. See Life Insurance Company of Virginia, 123 N.L.R.B., 610, 614 (1959); Quaker City Life Insurance Company, 134 N.L.R.B., 960, 962 (1961). See Donnelly, New National Labor Relations Board Criteria for the Organization of Insurance Agents, 1962 Insurance Law Journal 175 (1962). The criteria or factors considered for

a single district office unit and for a unit comprising several district offices will differ in the same way as they differ somewhat in single plant and multi-plant determinations.[18] Thus while a single district office may be an appropriate unit, a grouping of two may not be, in the same general area where there are three district offices. If the same reasons which form the basis for a grouping of two, also apply to a grouping of three, the grouping of two may be inappropriate, because either arbitrary or in violation of 9(c)(5). See N.L.R.B. v. Convair Pomona, 286 F.2d 691 (9 Cir. 1961). That kind of claim made by Metropolitan here is readily refuted. The grouping of the two district offices was founded in part on cogent geographical considerations. The third district office not included was forty-six miles from Wilmington.

On a petition for enforcement, where there is a claim of gerrymandering or of a violation of 9(c)(5), the court, inter alia, in its study of the record will have that specifically in mind. See dissent in Equitable Life Insurance Company, 138 N.L.R.B. 529 (1962); see also the dissent in Garden State Hosiery, 74 N.L.R.B. 318, 326 (1947). We mention this because of the position taken by Metropolitan that the Board in this action and in others used simulated bases for its decisions which were in reality controlled by the union's extent of organization. Petitioner draws a long bow in that charge which is not borne out by the record. Our own close examination of the latter has satisfied us

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[18] For factors used to determine multi-plant units, see Continental Baking Company, 99 N.L.R.B. 777 (1952); Father & Son Shoe Stores, Inc., 117 N.L.R.B. 1479 (1957) cited in Life Insurance Co. of Virginia, 123 N.L.R.B. 610 (1959) special concurrence of Member Fanning at p. 614; 16 N.L.R.B. Ann. Rep. 98-102 (1951); 15 N.L.R.B. Ann. Rep. (1950).

that the grounds upon which the Board rendered its determination are not unreasonable and are supported by substantial evidence on the whole case.

The petition for review will be denied. The order of the Board will be enforced. A proposed form of decree may be submitted.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

141 NLRB No. 37 D-5236
Wilmington, Del.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-CA-2769

METROPOLITAN LIFE INSURANCE COMPANY

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

Decision and Order

On January 7, 1963, Trial Examiner Samuel M. Singer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report.

The Board has reviewed the Trial Examiner's rulings and finds no prejudicial error. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

[1] As set forth in footnote 1 of the Intermediate Report, at the hearing Respondent and the Union indicated their intention to move the Board to amend the unit description herein for purposes of clarification. However, no such motion has been received by the Board and no exception was taken to the Trial Examiner's denial of Respondent's motion made to him.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner, with the following modifications:

Substitute the following for paragraph 1(b) of the Recommended Order: "Interfering with the efforts of the Insurance Workers International Union, AFL-CIO, to negotiate for or represent the employees in the said appropriate unit as the exclusive bargaining agent."

Substitute the following for the last paragraph of the Appendix to the Intermediate Report:

> WE WILL NOT interfere with the efforts of the INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, to negotiate for or represent the employees in the said appropriate unit as the exclusive bargaining agent.

Dated, Washington, D. C. Mar 11 1963

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS AND BOYD LEEDOM,
MEMBERS, dissenting:

In our dissenting opinion in the representation proceeding which underlies this complaint case, 138 NLRB No. 73, we indicated that we would have found inappropriate the unit that the Union was seeking. We adhere to our views there expressed, and would accordingly dismiss the instant complaint.

Dated, Washington, D. C. Mar 11 1963

Philip Ray Rodgers, Member
Boyd Leedom, Member
NATIONAL LABOR RELATIONS BOARD

Intermediate Report and Recommended Order

IR-6-63
Philadelphia, Pa.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

Case No. 4-CA-2769

METROPOLITAN LIFE INSURANCE COMPANY

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

Eugene M. Levine, Esq., of Philadelphia, Pa., for the General Counsel.

Marvin Dicker, Esq., of New York, N. Y., for the Respondent.

Isaac N. Groner, Esq., of Washington, D. C., for the Charging Party.

Before: *Samuel M. Singer*, Trial Examiner.

Statement of the Case

Upon a charge filed October 29, 1962, by Insurance Workers International Union, AFL-CIO, the General Counsel of the National Labor Relations Board, by the Regional

Director for the Fourth Region, issued a complaint on November 9, 1962, alleging that Metropolitan Life Insurance Company, Respondent herein, refused to bargain collectively with the Union, the certified majority representative of Respondent's employees in an appropriate bargaining unit. Respondent admits that it has refused to bargain with the Union but contends that the Union was not properly certified, in that the unit found by the Board in the representation proceeding, Case No. 4-RC-4865, was not an appropriate unit.

Pursuant to due notice, a hearing was held before me in Philadelphia, Pennsylvania, on December 17, 1962. All parties were represented by counsel and were afforded full opportunity to be heard and to adduce evidence.

Upon the entire record in the case, I hereby make the following:

Findings and Conclusions

I. The business of Respondent

Respondent, a New York corporation, with its principal office in New York City, is engaged in the business of selling various types of insurance throughout the United States and Canada, including the State of Delaware. Among its numerous offices, Respondent maintains two district offices in the metropolitan Wilmington, Delaware, area which are involved in this proceeding. During the past year, a representative period, Respondent, in the course and conduct of its business operations, derived an income in excess of $1,000,000, of which more than $50,000 (derived from premiums collected within the State of Delaware) was remitted from its Delaware offices.

Upon the foregoing facts, Respondent concedes, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

Upon a petition for certification filed by the Union in Case No. 4-RC-4865, and after a hearing held on March 20 and 21, 1962, the Board on September 13, 1962, issued a Decision and Direction of Election (138 NLRB No. 73) in which it directed an election in a unit consisting of certain employees[1] at Respondent's two district offices (Brandywine and Kirkwood) in the metropolitan Wilmington area. On October 5, 1962, in an election by secret ballot conducted under the supervision of the Regional Director for the Fourth Region, a majority of the employees selected the Union as their representative, and on October 15, 1962, the Regional Director certified the Union as the exclusive bar-

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[1] "All debit insurance agents, including all canvassing regular and office account agents selling industrial life insurance and other forms of insurance sold by the Company, but excluding independent agents, retired agents, Metropolitan Insurance consultants, managers, assistant managers, cashiers, clerical employees, secretaries, professional employees, guards, watchmen and supervisors as defined in the Act."

In the instant complaint hearing, Respondent moved to amend the above unit description by including certain "clarifying" language which it was claimed, was inadvertently omitted by the Board. Although the Union joined in the motion and the General Counsel did not specifically object thereto, I denied the motion on the ground that I considered myself without authority to amend the unit description in the Board's Decision and Direction of Election. The parties thereafter indicated that they would file a joint motion directly with the Board. Pending the Board's ruling on the proposed motion, I must find that the unit as hereinbefore set forth is the appropriate bargaining unit.

gaining representative of the employees in the appropriate unit.

The complaint alleges that commencing on or about October 17, 1962, and continuing to date, the Union has requested Respondent to bargain with it as the statutory bargaining representative of the employees in the unit found appropriate above but that Respondent has since on or about October 25, 1962, refused to bargain with it. Respondent in its answer admits its refusal to bargain with the Union, contending, by way of "affirmative" defenses, that the unit established by the Board is not appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act; and that the Board, contrary to the mandate of Section 9(c)(5) of the Act, gave "controlling effect to the extent to which the employees had organized" in determining the appropriate unit. Respondent at the hearing renewed these contentions, explaining that its objections are predicated on the geographical extent of the unit established by the Board and adding that the Board, by reason of establishing an "inappropriate" geographical unit, acted arbitrarily and capriciously. However, Respondent conceded that its contentions have been raised previously in the representation proceeding, that they have been considered by the Board, and that they have been decided adversely to it. Respondent did not seek to offer any new evidence and neither Respondent, nor any other party, called any witnesses.

The law is settled that, absent newly discovered evidence, the issues raised and determined in the prior representation proceeding may not be relitigated in the complaint proceeding, *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U. S., 146, 157-158; *N.L.R.B.* v. *American Steel Buck Corp.*, 227 F. 2d 927, 929 (C. A. 2); *N.L.R.B.* v. *Botany Worsted Mills*, 133 F. 2d 876, 882 (C. A. 3); *N.L.R.B.* v. *West Kentucky*

Coal Co., 152 F. 2d 198, 200-201 (C. A. 6), cert. den. 328 U. S. 866; *Quaker City Life Insurance Company*, 138 NLRB No. 5. It is equally clear that as an Examiner of the Board, I am bound by the Board's earlier unit determination and the ensuing certification. *West Kentucky Coal Co., supra*, 152 F. 2d at p. 201; *Air Control Products of St. Petersburg, Inc.*, 139 NLRB No. 29; *Esquire, Inc.*, 109 NLRB 530, 539, enforced 222 F. 2d 255 (C. A. 7).

Accordingly, on the basis of the Board's prior determination in the representation proceeding, I find and conclude that during all times material herein, the Union has been, and now is, the certified collective-bargaining representative of Respondent's employees in the appropriate unit hereinbefore described. I further find and conclude that Respondent has, since October 25, 1962, refused to bargain collectively with the Union as the exclusive representative of its employees in the unit; and that Respondent by such refusal has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and, derivatively, also Section 8(a)(1) of the Act.

On the basis of the foregoing and upon the entire record in this and the representation proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following:

Recommended Order

Metropolitan Life Insurance Company, its agents, officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Insurance Workers International Union, AFL-CIO, as the duly certified exclusive bargaining representative of its employees at its Brandywine and Kirkwood district offices in the metropolitan Wilmington, Delaware, area, in the following unit:

All debit insurance agents, including all canvassing regular and office account agents selling industrial life insurance and other forms of insurance sold by the Company, but excluding independent agents, retired agents, Metropolitan Insurance consultants, managers, secretaries, assistant managers, cashiers, clerical employees, professional employees, guards, watchmen, and supervisors as defined in the Act.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the right to bargain collectively through said Union, or any other labor organization of their own choosing.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the said certified Union as the exclusive representative of the employees in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other conditions of employment; and, if an agreement is reached embody it in a signed contract.

(b) Post at its Brandywine and Kirkwood district offices, in the metropolitan Wilmington, Delaware, area, copies of the notice attached hereto marked Appendix.[2] Copies of the said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by Re-

[2] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

spondent's representative, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director for the Fourth Region, in writing, within 20 days of the receipt of the Intermediate Report and Recommended Order, what steps it has taken to comply herewith.[3]

Dated at Washington, D. C.

/s/ SAMUEL M. SINGER

Samuel M. Singer
Trial Examiner

[3] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

IR-6-63

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL bargain collectively, upon request, with INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive bargaining representative of all employees at the Brandywine and Kirkwood district offices in the metropolitan Wilmington, Delaware, area, in the bargaining unit described below concerning wages, rates of pay, hours of employment, and other conditions of employment and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

> All debit insurance agents, including all canvassing regular and office account agents selling industrial life insurance and other forms of insurance sold by the Company, but excluding independent agents, retired agents, Metropolitan Insurance consultants, managers, assistant managers, cashiers, clerical employees, secretaries, professional employees, guards, watchmen and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively as aforesaid, nor will we, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to bargain collectively through said union.

METROPOLITAN LIFE INSURANCE COMPANY
(Employer)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut & Juniper Streets, Philadelphia 7, Pennsylvania (Tel. No. Pennypacker 5-2612), if they have any question concerning this notice or compliance with its provisions.

Decision and Direction of Election

D-4076

138 NLRB No. 73 Wilmington, Delaware

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 4-RC-4865

METROPOLITAN LIFE INSURANCE COMPANY,

Employer,

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Joseph F. Rosenthal, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record[1] in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

[1] Because, in our opinion, the record and briefs adequately set forth the issues and positions of the parties, the Employer's request for oral argument is hereby denied. Also, for the reasons hereinafter stated, the Employer's motion to dismiss the petition on the grounds that the unit petitioned for is inappropriate is hereby denied.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The appropriate unit:

The Petitioner seeks a unit of the Employer's two district offices located in the Wilmington, Delaware, metropolitan area. The Employer contends that the appropriate unit should consist of either (1) all its offices in the United States; (2) all offices in its Atlantic Coast Territory; or (3) all its offices in the State of Delaware. Otherwise, the parties are in agreement as to the composition of the unit.

The Employer is engaged in the sale and issuance of various types of insurance policies and does business throughout the United States and Canada. It maintains its principal office in New York, New York, and, for administrative purposes, it has divided its offices throughout the United States into 14 territorial divisions. Each such division is headed by a superintendent of agencies who reports directly to a Company vice president. The offices sought by the Petitioner are included in the Employer's Atlantic Coast Territory, which encompasses the States of Delaware and Maryland, the City of Philadelphia, Pennsylvania, and all of the State of New Jersey, south of the Cities of Bayonne and Elizabeth.

The Petitioner's unit would include both of the Employer's district offices in the greater Wilmington, Delaware, metropolitan area. The Employer's closest office to these, and its only remaining office in the State of Delaware, is located in Dover, which is 46 miles from Wilmington.

The Employer's business operations are highly centralized and policies and procedures are established at the home office which governs the management of the district office and the duties and functions of the agents. The superintendent of agencies, whose office is located in New York, has the responsibility for seeing that the offices in his territory operate in accordance with these Company directions, and in the course of his duties, the superintendent of agencies makes periodic visits to the offices in his territory.

Each district office has a manager in charge, who is the immediate supervisory authority over the agents in the office. Agents are required by Company regulations to perform all of their work through and subject to the general supervision and direction of the manager of the district office to which they are assigned.[2] The manager normally solicits applications for openings in his district, and although, he does not have the authority to hire an individual applicant, he may recommend that such action be taken. In carrying out his function as a recruiter, the manager accepts the prospective agent's application, conducts a personal interview, and orders a retail credit and medical report. The application, together with the manager's recommendation, is then forwarded to the superintendent of agencies in New York who makes the final determination. New agents receive their initial training in New York and are then assigned to a district office where they receive additional training under the guidance and direction of the manager and assistant manager. Although the agent spends the greater part of his time in his assigned territory sell-

[2] The parties have agreed to exclude the managers and assistant managers from the unit, apparently on the theory that they are supervisors within the meaning of the Act.

ing industrial and other types of insurance, he is required to report to the district office twice a week and whenever the manager so directs. One day each week is devoted to a general meeting, at which the manager explains to his agents the latest Company directives. The manager regularly reviews the agent's performance and although he has no authority to terminate an agent's appointment, the manager may accept the agent's resignation, if tendered, or he may recommend to the superintendent of agencies that the agent be terminated. The manager may order an audit of the agent's accounts whenever he feels it is necessary, and in the event of a deficiency of 75 dollars or more in the agent's accounts, the manager is required to suspend him until further notice.

All labor relations' policies are established at the home office and all agents are subject to the same wage policies, employee benefits and working conditions. All bidding on job openings is limited to the agents of the particular district office where the opening occurs. There is virtually no interchange or transfer of agents among the various district offices and there is no business or social contact among agents except on the individual district office level. There is no history of collective bargaining affecting the employees involved in the instant proceeding.

In view of the foregoing, and the entire record, we find that the individual district office is in effect a separate administrative entity through which the Employer conducts its business operations, and therefore is inherently appropriate for purposes of collective bargaining. However, as we have previously stated,[3] this finding does not preclude the grouping of such offices where such grouping is justified

[3] *Metropolitan Life Insurance Company*, 138 NLRB No. 64.

by cogent geographic considerations. Therefore, as the Petitioner is seeking a unit comprising all of the Employer's offices in a separate and distinct area, the Wilmington, Delaware, metropolitan area, and as there is no history of collective bargaining covering employees in these offices and no union seeks a broader unit, we find that such a unit may be appropriate for purposes of collective bargaining.[4]

Accordingly, we find that the following employees at the Employer's district offices in the metropolitan Wilmington, Delaware, area, including the Brandywyne and Kirkwood offices, constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act:

> All debit insurance agents, including all canvassing regular and office account agents selling industrial life insurance and other forms of insurance sold by the Company, but excluding independent agents, retired agents, Metropolitan Insurance consultants, managers, assistant managers, cashiers, clerical employees, secretaries, professional employees, guards, watchmen and supervisors as defined in the Act.[5]

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, in paragraph 4 above, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to

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[4] *Ibid.*

[5] The unit description appears as amended and stipulated to at the hearing.

vote are those in the unit who were employed during the payroll period immediately preceding because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Insurance Workers International Union, AFL-CIO.

Dated, Washington, D. C. Sep 13 1962

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS AND BOYD LEEDOM, MEMBERS, dissenting:

For the reasons stated in our dissenting opinions in *Quaker City Life Insurance Company,* 134 NLRB No. 114, *Metropolitan Life Insurance Company,* 138 NLRB No. 64, and *Equitable Life Insurance Company,* 138 NLRB No. 70, we would find the unit sought inappropriate and dismiss the petition.

Dated, Washington, D. C. Sep 13 1962

Philip Ray Rodgers, Member

Boyd Leedom, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6154

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION TO REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before:

WOODBURY, *Chief Judge*, and
HARTIGAN and ALDRICH, *Circuit Judges.*

Burton A. Zorn, with whom *Jeremiah W. Mahoney, George G. Gallantz, Marvin Dicker, Thomas F. Delaney, Lyne, Woodworth & Evarts* and *Proskauer, Rose, Goetz & Mendelsohn* were on brief, for petitioner.

Warren M. Davison, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, and *Gladys Kessler*, Attorney, were on brief, for respondent.

Opinion of the Court

February 17, 1964

WOODBURY, *Chief Judge.* On petition of Insurance Workers' International Union, AFL-CIO, the National Labor Relations Board in a proceeding under § 9(c) of the Act, 29 U.S.C. § 159(c), certified the Union as the bargaining representative of all debit insurance agents, including all canvassing regular and office account agents, at Metropolitan Life Insurance Company's district office in Woonsocket, Rhode Island. The Company deliberately refused to bargain collectively with the Union in order to challenge the appropriateness of the employee unit certified by the Board. See *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 411 (1940); *Pittsburg Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 154 (1941). The Company agrees with the Board's classifications of employees included and excluded. That is to say, the Company does not contend that the unit certified by the Board contains ineligible employees or employees whose interests are antagonistic. Its contention is that an employee unit consisting of the debit insurance agents working out of only its one Woonsocket district office is inappropriate. Its position is that the only appropriate unit would encompass either 1) all of its offices in the United States, or 2) all of its offices in its New England Territory (Maine, New Hampshire, Vermont, Massachusetts and Rhode Island), or 3) all of its offices in Rhode Island. Furthermore, it says that in determining that the debit insurance agents at only one of its eight district offices in Rhode Island constituted an appropriate unit for collective bargaining, the Board treated as controlling the extent to which the Union had so far organized its employees in Rhode Island in clear violation of § 9(c)(5) added to the National Labor Relations Act by the Labor

Management Relations Act; 1947, 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(5), quoted in its pertinent context in the margin.[1]

The Board's policy for determining appropriate bargaining units of debit insurance agents has not been consistent over the years. In *Metropolitan Life Ins. Co.*, 56 NLRB 1635 (1944), the Board announced that, departing from its previous policy, it would in the future, in the absence of unusual circumstances, avoid setting up units of debit insurance agents smaller than state-wide in scope. It said:

> "Based upon the extent of organization among employees of an employer, we have frequently found appropriate for bargaining purposes small groups of employees with a provision for revision of a unit upon a later showing of broader organization. We believe, however, that the principle upon which we have set up such units is not controlling in the instant case. Organization among insurance agents is comparatively recent, but is steadily growing. The tendency of such organization is toward State-wide units. . . . Thus, the rapid growth of union organization among insurance agents makes it clearly appear that provisional units less than State-wide in scope are, under ordinary cir-

[1] Sec. 9.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

* * * * *

"(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

cumstances, unnecessary to make collective bargaining reasonably possible for them if they desire it. Accordingly, we are of the opinion that, in the absences of unusual circumstances, the practice of setting up units for insurance agents smaller that [sic] State-wide in scope should be avoided. In the instant case, since the . . . [unions] are all actively engaged in a broad organizational program in Ohio, and since it may reasonably be anticipated that one of these organizations may in the near future extend its membership to State-wide proportions, we are of the opinion that it will not effectuate the policies of the Act to set up city-wide units for employees of the Company in Ohio at this time." *Id.* at 1639-1640.

In 1961 a majority of the Board in *Quaker City Life Ins. Co.*, 134 NLRB 960, changed the policy the Board had established in the *Metropolitan Life Ins. Co.* case in 1944 by determining that the debit insurance agents of Quaker City's one district office in Alexandria, Virginia, constituted an appropriate bargaining unit. The majority in the *Quaker City* case quoted from the language quoted above from the *Metropolitan Life* case and said:

"Clearly this language of the *Metropolitan Life* case indicates that the rule was adopted *solely* in anticipation of broader organization on a companywide or statewide basis, which at that time seemed imminent. As a practical matter, however, such statewide or companywide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter, by the Board that decided the *Metropolitan*

> *Life* case. There is no longer any rational basis for applying different rules of organization to the insurance industry than are applied to other industries. The rule was adopted for the purpose of permitting organization on a statewide or employerwide basis, which did not develop as anticipated. Contrary to our dissenting colleagues, we regard this as a valid reason for changing the rule. Obviously, when the purpose for which a rule has been established fails, the rule should also fail. This is especially so with respect to a rule which unfairly prejudices the collective-bargaining rights of employees. Accordingly, in the future, the Board's policy will not be to preclude the organization of insurance agents into units of less than employerwide or statewide scope, and we shall apply our normal unit principles to the cases as they arise. In the instant case, upon the record as a whole, and especially in view of the autonomous day-to-day operation of the district office here, the overall immediate supervision by the district manager, the lack of contact or interchange among employees of the various district offices, and the absence of any administrative subdivision between the home office and the district office, we find the district office unit to be appropriate." *Quaker City Life Ins. Co.*, 134 NLRB 960, 962 (1961)

The two dissenting members of the Board said that they could see "no valid reason for departing from the *Metropolitan Life* rule which the Board adopted in 1944." *Id.*

The United States Court of Appeals for the Fourth Circuit, Judge Boreman dissenting, enforced an order of the Board requiring Quaker City Life Insurance Company to bargain collectively with the same union involved herein

as the bargaining representative of the unit certified by the Board in its underlying representation proceeding. *NLRB v. Quaker City Life Insurance Company*, 319 F.2d 690 (C.A. 4, 1963), *enforcing* 138 NLRB 61 (1962).

In subsequent cases a majority of the Board, with the same two members dissenting, certified as appropriate units consisting of nine of Metropolitan's district offices in the Cleveland, Ohio, metropolitan area (six offices in the City and three suburban offices eight or nine miles distant), *Metropolitan Life Ins. Co.*, 138 NLRB 512 (1962), [unfair labor practice decision, 141 NLRB No. 96 (1963)] *on appeal to Sixth Circuit*, Case No. 15366; two of Metropolitan's three district offices in Delaware, *Metropolitan Life Ins. Co.*, 138 NLRB 565 (1962), [unfair labor practice decision, 141 NLRB No. 37 (1963)] *on appeal to Third Circuit*, Case No. 14390; Metropolitan's single district office in Sioux City, Iowa, together with two detached offices under its administrative control in Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120 miles distant, respectively, from Sioux City, *Metropolitan Life Ins. Co.*, 138 NLRB 734 (1962); and all of Metropolitan's district offices within the political limits of the City of Chicago, thereby excluding suburban offices even though six of the thirty-three city district offices had territories extending beyond the city limits and three of the fourteen suburban offices had territories extending into the city. *Metropolitan Life Ins. Co.*, 144 NLRB No. 15 (1963). In *Equitable Life Ins. Co.*, 138 NLRB 529 (1962), the Board determined appropriate a unit consisting of two district offices in Cleveland, Ohio, with a detached office in Lorain, Ohio, 28 miles away. And in this case the Board majority relying on prior decisions determined that one district office out of eight in a small densely populated state constituted an appropriate bargain-

ing unit. The two dissenting members of the Board merely referred to their dissents in the *Quaker City Life Ins. Co.* case and in others in which they had not only reiterated that they saw no reason to depart from the policy established in the *Metropolitan Life* case of 1944, but had said that it appeared to them that the majority's unit determination was based upon the union's extent of organization of the debit agents involved.

We are very well aware that § 9(b) of the Act confers such broad discretion on the Board that a unit determination by it "if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *International Typographical Union Local 38* v. *NLRB*, 278 F.2d 6, 10 (C.A. 1, 1960), *aff'd in part, rev'd in part*, 365 U.S. 705 (1961). But we would be remiss in our duty as an enforcing court should we overlook or ignore an evasion by the Board of the command laid upon it by § 9(c)(5), *supra*.

We are seriously handicapped in this case by the Board's failure to articulate specific reasons for its unit determination. It merely said in a footnote to its decision and direction of election:

> "The Employer has eight district offices and two detached offices in Rhode Island, and has only one district office in Woonsocket. The nearest district office is located 12 miles away in Pawtucket. In the prior proceeding in Case No. 4-RC-4865, based on the same record incorporated by reference herein, we found that each of Employer's individual offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining. See *Metropolitan Life Insurance Com-*

pany, 138 NLRB No. 73.[2] Applying the tests set forth therein, we find that, since there is no recent history of collective bargaining, no union seeking a larger unit, and the district office sought is located in a separate and distinct geographical area, the employees located at the Woonsocket district office constitute an appropriate unit. See also *Metropolitan Life Insurance Company*, 136 NLRB No. 87."[3]

Not only do the cases cited by the Board majority not directly support its decision, but also the criterion of location in a separate and distinct geographical area is not a criterion consistently applied by the Board as its decisions in Metropolitan's Cleveland and Chicago cases cited herein above clearly demonstrate.

In the Chicago case the Board majority said:

> "While 6 of the employer's 33 offices in the city of Chicago have territories extending beyond the city limits, and 3 of the 14 suburban offices have territories extending into the city, we do not regard this factor as undermining the appropriateness of a unit confined to the city because the territorial boundaries of district offices may be subject to frequent change. Because of this, the Board has relied not upon territorial boundaries but upon the physical location of the indi-

[2] This is Case No. 4 - RC - 4865 reported 138 NLRB 565 (1962) in which the Board majority determined that two of Metropolitan's three district offices in Delaware constituted an appropriate bargaining unit.

[3] This is a mis-citation. No. 87 is reported 138 NLRB 734 and is the decision in which the Board majority determined that Metropolitan's single district office in Sioux City, Iowa, together with its two detached offices in Fargo, North Dakota, and Sioux Falls, South Dakota, constituted an appropriate bargaining unit.

vidual offices as the yardstick in determining the geographic appropriateness of the unit." *Metropolitan Life Ins. Co.*, 144 NLRB No. 15 (1963).

At first blush there is a certain plausibility to this reasoning despite doubts that city boundaries provide a more satisfactory basis for determining a separate and distinct geographical area than do the business-prescribed areas delegated to each company office or the metropolitan area which has developed through natural growth.[4] Plausibility fades, however, upon consideration of Metropolitan's Cleveland case wherein the Board majority had previously decided that the Cleveland metropolitan area constituted an appropriate unit and certified a combination of six offices in the city and three in the suburbs, *Metropolitan Life Ins. Co.*, 138 NLRB 512 (1962). Why there should be a community of interest among Metropolitan's agents working from both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago is not explained by the Board majority and is beyond our comprehension.[5]

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[4] As the dissenting members said: "If the appropriateness of insurance agents' units is to be determined by geographic considerations, we think it would be more reasonable to be guided by the metropolitan, or natural, confines of a geographic area, rather than the political limits of a city which are artificial and may be arbitrarily drawn. . . ." *Id.*

[5] The Regional Director apparently had the same difficulty for he concluded that it would be improper to limit the unit to offices located within the city limits of Chicago because such a unit would include certain areas in the suburbs and exclude certain other areas in the city. Therefore he directed an election by the employees in all of the Metropolitan's offices in the greater Chicago area. *Metropolitan Life Ins. Co.*, 144 NLRB No. 15 (1963).

The Board majority in this case did not discuss what weight, if any, it gave to the factor of extent of union organization. Nor indeed has the majority done so in any of its decisions since *Quaker City*.*

Looking at its actions, however, we have not found a single instance since *Quaker City* wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union. We would not consider this fact alone decisive for we would hesitate to assume that the Board was subservient to the Union. Yet we believe this fact is entitled to considerable weight in the light of the testimony of the Union's vice-president in Metropolitan's Cleveland case, *supra,* which was incorporated by stipulation in the record in the instant case, that if the Union did not succeed in organizing on a broader basis it would as a matter of policy petition for a unit "on a district basis." Indeed it is apparent that the Union followed this policy in the present case for in May and June 1962 it had engaged in organizational activities among agents attached to all of the Company's 8 district offices and 2 detached offices in Rhode Island, and it was only after lack of success in its state-wide attempt that it sought and received the Board's acceptance of the single district office in Woonsocket.

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* Judge Boreman in his dissent in that case at page 696 found more than a hint that extent of union organization was again dominant in the Board's thinking. He wrote: "Indeed . . . the Board in stating the rationale of its determination to reverse the policy decision in Metropolitan, clearly indicates that its newly adopted policy is, in reality, based upon the extent of organization factor when it now says that the 'language of the Metropolitan Life case indicates that the rule was adopted *solely* in anticipation of broader organization on a company or state-wide basis, which at that time appeared imminent,' but that 'as a practical matter, however, such state or company-wide organization has not materialized.' "

In short, the Union naturally wants units in which it can win elections and on the basis of the Board majority's actions, which speak more clearly than its words, it seems to us evident that in this case the Board majority in keeping with its apparent practice in recent years has given the Union the unit it wants. In the absence of any statement by the Board majority of any other rational basis for its varying unit determinations, we can only conclude that the two member Board minority is correct in its charge that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of § 9(c)(5) of the Act.

A decree will be entered setting the Board's order aside and denying the Board's cross-petition for enforcement.

Decree

February 17, 1964

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6154

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

This cause came on to be heard upon petition to review and set aside and cross-petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of May 7, 1963, is hereby set aside, and the Board's cross-petition for enforcement is denied.

By the Court:

Roger A. Stinchfield, Clerk.

By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

A true copy:

Attest: Roger A. Stinchfield, Clerk.

By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

[Cer. c: Messrs. Zorn, Mallet-Prevost and Alpert.]